

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 17.25 percent whole body functional impairment rating and assessed the entire Award to the respondent and its insurance carrier. The respondent requested this review and asks the Appeals Board to review the Judge's findings of (1) nature and extent of disability, (2) claimant's right to temporary total disability benefits for 2.71 weeks between August 10 and August 29, 1994, and (3) the liability of the Workers Compensation Fund.

Respondent contends that claimant's functional impairment is in the range of 1.5 to 2.5 percent, that claimant is not entitled to temporary total disability benefits for the period in question because he left the state on a long motorcycle trip, and that the Workers Compensation Fund is responsible for one-half of the Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

1. Nature and Extent of Disability.

Claimant injured his back at work on August 23, 1993. Because claimant has returned to work for the respondent, he does not request work disability.

The Appeals Board finds claimant has sustained an 11 percent whole body permanent functional impairment due to his work-related accident and should receive permanent partial general disability benefits based upon that rating as provided by K.S.A. 44-510e, (Furse).

At respondent's request, board-certified orthopedic surgeon Edward J. Prostic, M.D., examined and evaluated claimant in September 1994. Based upon his clinical findings and a video tape of claimant, Dr. Prostic testified that he believes claimant is either malingering or has symptom magnification. However, he also testified that claimant has a 3 to 5 percent whole body functional impairment due to the back strain claimant experienced in his August 1993 accident, although he is not certain whether it was the lumbar or thoracic spine that was injured.

The Administrative Law Judge appointed board-certified neurosurgeon Revis C. Lewis, M.D., to examine claimant and provide an independent medical evaluation. Dr. Lewis examined claimant in April 1995 and felt that claimant had a 16 percent whole body functional impairment for a lower thoracic disc protrusion and a 2 to 3 percent whole body functional impairment for a lumbosacral strain. He did not believe that claimant had symptom magnification.

The Appeals Board finds the ratings provided by Drs. Prostic and Lewis should be given equal weight. The Appeals Board finds Dr. Prostic's rating to be somewhat low because he completely discounted impairment for the thoracic disc. On the other hand, the Appeals Board finds Dr. Lewis' rating to be somewhat high because it discounts claimant's demonstrated abilities as shown on the video tape. Despite claimant's testimony that he avoided bending, squatting and kneeling unless absolutely necessary, the video tape indicated the contrary. Therefore, the Appeals Board averages the doctors' functional

impairment ratings and finds that claimant has sustained an 11 percent whole body functional impairment as a result of his August 1993 accident.

Respondent argues that claimant's functional impairment rating should be reduced under the provisions of K.S.A. 44-501(c) relating to preexisting functional impairment. The Appeals Board disagrees. Before the August 1993 accident, claimant's back was asymptomatic and did not restrict or limit him in any manner. Although claimant believes he pulled some muscles in his back in September 1990 while working for the respondent, he returned to full duty later that same day. Before his August 1993 accident, claimant was never provided an impairment rating or permanent work restrictions. The alleged preexisting condition was asymptomatic and neither restricted nor limited claimant's abilities and activities, and the medical experts were left to speculate about the extent of preexisting functional impairment. Therefore, the Appeals Board finds that the evidence fails to establish the extent of claimant's alleged preexisting functional impairment, if any, and K.S.A. 44-501(c), (Furse) is, therefore, inapplicable.

2. Claimant's Entitlement to 2.71 Weeks of Temporary Total Disability Benefits.

The respondent contends claimant is not entitled to 2.71 weeks of temporary total disability benefits for the period of August 10 through August 29, 1994. Although claimant's treating physician had him off work during that period, respondent stopped his temporary total disability benefits because claimant left the state on an extended motorcycle trip. The Appeals Board agrees with the analysis and conclusion of the Administrative Law Judge that claimant is entitled to receive temporary total disability benefits for the period in question.

In support of its argument respondent cited the portion of the temporary total statute, K.S.A. 44-510c, (Furse), that pertains to temporary total disability benefits when an injured worker is released to work with temporary medical limitations. The statutory language upon which respondent premised its argument is inapplicable, because claimant was restricted from all employment during the period in question and had not been released to work with temporary restrictions.

3. The Liability of the Workers Compensation Fund.

The Appeals Board finds the Workers Compensation Fund is not responsible for any part of this Award. The Appeals Board finds that claimant did not have a preexisting impairment that constituted a handicap before the August 1993 accident. As provided by K.S.A. 44-566 and K.S.A. 44-567, Fund liability may be assessed in those cases involving subsequent injuries to employees who have preexisting impairment of such character that it constitutes a handicap in obtaining or retaining employment. As indicated above, claimant had only minor back complaints before August 1993 that neither restricted nor limited him in any manner. Any impairment that claimant possessed before August 1993 was minor in nature and did not constitute a handicap as that term is defined by K.S.A. 44-566. Therefore, the Appeals Board agrees with the Administrative Law Judge's conclusion that the Workers Compensation Fund is not responsible for any portion of this Award although the Appeals Board may disagree with the Judge's analysis.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer dated February 2, 1996 should be, and hereby is, modified to the extent that claimant is entitled to receive permanent partial disability benefits for an 11% whole body functional impairment. The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if set forth fully herein to the extent that they are not inconsistent with the above.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jay R. Settles, and against the respondent, Continental Plastic Containers, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred August 23, 1993 and based upon an average weekly wage of \$570.90, for 47.71 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$14,933.23, followed by 42.05 weeks at the rate of \$313.00 per week or \$13,161.65 for an 11% permanent partial general disability, making a total award of \$28,094.88.

As of June 7, 1996, there is due and owing claimant 47.71 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$14,933.23, followed by 42.05 weeks of permanent partial disability compensation at the rate of \$313.00 per week in the sum of \$13,161.65, for a total of \$ 28,094.88 which is ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William P. Ronan III, Overland Park, KS
Gregory D. Worth, Lenexa, KS
Jeffrey A. Dehon, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director